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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARION OVERTON WHITE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence of acts similar to and in close proximity to the charged offense may be introduced by the government in a criminal prosecution without regard to the limitations of Rule 404(b) of the Federal Rules of Evidence by simply labeling such evidence as "part and parcel" of the charged offense.

2. Whether the government in a criminal case may introduce evidence of crimes not charged in the indictment when there is no showing that any issue on which extrinsic act evidence may be used under Rule 404(b) is in fact in dispute.

3. Whether a party is deprived of an impartial jury when a juror is shown to have intentionally lied during voir dire in order to be accepted on the jury.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Marion Overton White, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 2, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is included in the Appendix to this petition. The orders denying rehearing are also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on June 2, 1989. A timely petition for rehearing and suggestion for rehearing *en banc* were

filed on June 23, 1989. The petitions for rehearing were denied on July 27, 1989. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18: Section 1503 provides in relevant part:

> Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5000 or imprisoned not more than five years, or both.

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Petitioner, an attorney, was indicted in the Western District of Louisiana in May, 1987. The indictment charged in two counts that petitioner had committed perjury during a deposition in a civil case pending in the Western District and had obstructed justice by endeavoring to influence a witness in that case. The civil action out of which the criminal indictment arose resulted from a vehicular accident that occurred in June, 1984 on a highway near petitioner's home.

On June 14, 1984, a commercial trailer truck hit several cows that had wandered onto a state highway north of Opelousas, Louisiana. The driver of the truck lost control of the vehicle and it left the roadway and turned

over. The driver was injured and the truck damaged. The cows were identified as belonging to petitioner, Marion White.

Separate damage actions were subsequently filed by the driver and by the owner of the truck in state court and in the United States District Court for the Western District of Louisiana against White and his insurer. White initially claimed, and the cases were defended, on the ground that White had sold the cows to another party prior to the accident. In a deposition taken in the federal proceeding White testified that he had sold the cows prior to the accident to a Mr. Green and that two other men, Wilken "Pie" Green and Elgy Sam, had hauled the cattle off his (White's) property after the sale. Subsequently Arthur Ted Green was identified by White and the insurer as the owner of the cattle involved in the accident. This allegation was subsequently withdrawn. The state damage action was tried and a judgment was entered against White and his insurer.

In May, 1987, White was indicted by a federal grand jury for perjury and obstruction of justice. (R. 1-14) Count I of the indictment charged that White had lied under oath during a deposition in the federal civil action against him when he claimed: (1) that he had sold his cows to Pie Green or Ted Green; (2) that Elgy Sam had transferred the cattle for him after the sale; and (3) that Green had demanded back money he had paid for the cattle after the accident. In addition, Count I contained allegations that White had approached both Pie Green and Elgy Sam and asked them to lie about the ownership of the cattle and their involvement. (R. 1-2) Count I only charged, however, a violation of 18 U.S.C. Sec. 1621, the perjury statute. Count II of the indictment alleged that White had violated 18 U.S.C. Sec. 1503, the obstruction of justice statute, by "endeavoring to induce and otherwise influence Arthur Ted Green, to claim

ownership of certain cattle which became the subject of [the law suit]." (R. 13)

Prior to trial, Count I of the indictment was dismissed because the court reporter who had taken the deposition was not authorized by law to administer oaths as required in 18 U.S.C. Sec. 1621. The defendant was thus tried on the obstruction of justice count which *only* charged that he had endeavored to influence Arthur Ted Green.

During the trial the government called as witnesses Wilken "Pie" Green and Elgy Sam to testify concerning alleged efforts that defendant had made to convince them to lie about their involvement with the cattle. R. Vol. VII, 51-64; Vol. X, 4-14) The admissibility of such evidence of wrongful acts other than that charged in the indictment was argued before the court and the United States Attorney asserted that the other act evidence was "intertwined" with the offense charged and that it was impossible to "tell the story" absent admission of the other acts. (R. Vol. VI, 71-72; 93-95) The trial judge admitted the other act evidence without making any finding that such evidence was admissible under Rule 404(b) of the Federal Rules of Evidence to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The defendant did not testify at trial or put on evidence concerning the merits of the government's charges. He did call several character witnesses. Defendant was convicted of obstruction of justice as charged in Count II of the indictment.

After trial, petitioner's attorneys discovered that one of the jurors had lied concerning his background during jury selection. During voir dire of potential jurors, one member of the panel, Robert Wayne Ward, had stated, under oath, that he was a third-year student at Southern University in Baton Rouge, Louisiana. (R. Vol. V, 56, 83) Southern University is a state university whose stu-

dent body and faculty are predominantly black. Petitioner is a graduate of Southern and both his children attend that university. Ward was lying. Although he was 21 years-old, he had just graduated from high school and had never attended college. (R. Vol. XI, 18-19) A motion was filed to set aside the verdict and for a new trial on the ground of juror bias and misconduct. (R. Vol. III, 349) During the evidentiary hearing on the motion, Ward admitted that he had intentionally lied during voir dire and that he had done so because he wanted to serve on the jury and thought he would stand a better chance to be chosen if he portrayed himself as a college student at Southern. (R. Vol. XI, 24-25) The trial judge denied petitioner's motion on the ground that there was no showing that Ward was biased against petitioner.

REASONS FOR GRANTING THE WRIT

I. The Courts Below Ruled That Evidence Of Other Crimes, Committeed For The Same Purpose And In Close Proximity To The Charged Offense, Can Be Introduced As "Part And Parcel" Of The Offense Without Regard To The Limitations Of Rule 404(b) FRE. Such A Rule Undermines The Purpose Of Rule 404(b) And Should Be Rejected.

The *only* crime for which petitioner was tried was that charged in Count II of the indictment--that petitioner had obstructed justice by endeavoring to influence Arthur Ted Green. At trial, however, a major part of the government's case consisted of proof that petitioner had tried to influence two other individuals, Pie Green and Elgy Sam, to lie concerning the ownership of the cattle involved in the accident.

At trial and on appeal the government argued that Rule 404(b) FRE was not applicable to the testimony of Pie Green and Elgy Sam because defendant's alleged efforts to convince those individuals to lie were "inextri-

cably intertwined" with the obstruction of justice charge involving Arthur Green. The Fifth Circuit accepted this argument.[1] The government's argument is based on the Fifth Circuit's decision in *United States v. Torres*, 685 F.2d 921 (5th Cir. 1982) and related cases which hold that "[a]n act is not extrinsic, and Rule 404(b) is not implicated, where the evidence of that act and the evidence of the crime charged are inextricably intertwined." *Torres, supra*, 685 F.2d at 924. See, *e.g.*, *United States v. Killian*, 639 F.2d 206, 211 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981).

The list contained in Rule 404(b) of purposes for which evidence of other crimes or acts may properly be admitted is not exclusive and many courts of appeal have ruled that "background" facts or those necessary to "complete" the jury's understanding of the crime charged are admissible under the rule. See e.g., *United States v. Potts*, 840 F.2d 368, 372 (7th Cir. 1987) (in prosecution for conspiracy to alter and transport postal money orders, evidence of conspirators' involvement in drug smuggling was admissible because drug smuggling and postal alteration schemes involved the same network of co-conspirators and the drug and money order activities could not "realistically" have been separated); *United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986) (in prosecution of state court judge for bribery, evidence of fixing of cases not charged in indictment was admissible to prove relationship of defendant and another person); *United States v. Tate*, 821 F.2d 1328, 1331 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 712 (1988) (government

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[1] "Nor are we persuaded by White's arguments that the testimony was improperly admitted under Rule 404(b). The district court, agreeing with the government, concluded that the defendant's conversations with Pie Green and Elgy Sam were 'part and parcel' of the offense of obstruction of justice as charged in Count II of the indictment, and as such were not improper evidence of other crimes." *United States v. White*, No. 88-4774 (5th Cir. 1989) (Panel Op. at 5).

properly allowed to prove shooting of police officers during prosecution for weapons violation because it could not have adequately explained the factual circumstances of its case without mention of the shootings).

The government argued below that other acts are "inextricably intertwined" with the charged offense so long as the other acts are of the same kind as the charged offense and were committed for the same purpose. Such a broad exception would seriously undercut the purpose of Rule 404(b) and is not justified by the rationale of the cases that except "inextricably intertwined" facts from the rule's limitations. *United States v. Torres, supra,* illustrates the proper role of "background" or "inextricably intertwined" facts in the context of Rule 404(b). In *Torres,* a prosecution for distributing cocaine, the government introduced evidence that defendants had on several occasions sold small "samples" of cocaine to a middleman for resale as a means of setting up the larger transaction charged in the indictment. The Court of Appeals upheld the admission of the sample transactions.

> In this case, although the "other acts" occurred at different times, they clearly were part of a single criminal episode. The government demonstrated that the sample transactions *were necessary preliminaries to the larger sale* that led to the defendants' arrests. It was during those transactions that the plans for the purchase of the larger quantity of cocaine were laid. These were not "other acts" of the type contemplated by Rule 404(b). Evidence concerning them was *necessary to provide coherence to the government's case.* (emphasis supplied)

685 F.2d at 924. The Court further explained that:

> Although not included in the indictment, the evidence of the sample transactions "formed an integral and natural part of the agents' accounts of the circumstances surrounding the offenses for which [the

> fendants] were indicted." Quoting from *United States v. Bloom*, 538 F.2d 704, 707 (5th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).
>
> In sum the evidence of the sample transactions was essential to explain the background of the one kilogram sale; it was not introduced to impugn the character of any of the defendants, the use that Rule 404(b) proscribes. The evidence was relevant, and its probative value outweighed any possibility of unfair prejudice.

685 F.2d at 925. As *Torres* demonstrates, the "intricably linked" caveat to Rule 404(b) should apply only to other acts so linked to the charged offense that the charged offense cannot adequately be explained without reference to the other acts. See *e.g.*, *United States v. Killian*, *supra* (evidence of drugs and firearms seized at time of arrest essential proof of charged conspiracy); *United States v. Martin*, 794 F.2d 1531, 1532-33 (11th Cir. 1986) (introduction of evidence of firearms recovered from boat used to smuggle drugs necessary to complete story of crime).

These cases *do not* stand for the proposition that any act allegedly committed by the defendant for the same purpose as the charged act can be admitted without regard to the limitations of Rule 404(b). Were that the case, one robbery or one drug transaction could always be used to prove another and 404(b) would be swallowed up by the exception. See, *United States v. Beasley*, 809 F.2d 1273, 1278 (7th Cir. 1987) ("A rule that a judge may admit all evidence that the defendant committed crimes of similar varieties produces the gravest risk of offending the central prohibition of Rule 404(b)").

This case demonstrates how the vague "background fact" rule relied on by the government can undermine Rule 404(b). The government alleged in the indictment, as a separate, distinct offense, that petitioner had ob-

structed justice by trying to influence the testimony of Arthur Ted Green. Petitioner's alleged contacts with Pie Green and Elgy Sam could have been independent criminal acts (they were in fact the basis for Count I of the indictment), but they were not part of a "single criminal episode" as that term was used in *Torres*. The testimony that defendant tried to influence two other persons was not a "necessary preliminary" to the event concerning Arthur Green and was not essential to explain the background of the obstruction of justice charge. Arthur Ted Green testified and the government had no need whatsoever of other acts of the defendant to explain the alleged bribe of Green. All the facts of the accident involving the cows, the ensuing law suits and the testimony of Arthur Ted Green concerning petitioner's efforts to influence his testimony presented a coherent story which, if believed, could justify a conviction. Petitioner's alleged efforts to influence the two other witnesses were not inextricably linked to the charged offense and were not necessary to explain the charged offense. The evidence did have the obvious effect of impugning defendant's character by putting before the jury other allegedly corrupt actions of the defendant—exactly the effect that Rule 404(b) is intended to prevent.

This Court has recently clarified the application of Rule 404(b) in *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L.Ed.2d 771 (1988). *Huddleston* explained that the trial judge should admit evidence of extrinsic acts where the evidence in the case is sufficient to justify a finding that the defendant committed the extrinsic acts. *Huddleston* was premised, however, on a finding that the *purpose* for which the extrinsic act evidence is admitted is proper under Rule 404(b). As this case demonstrates, the question of the appropriate purpose for which other crime evidence can be admitted, other than those specified in the rule itself, is in need of clarification.

II. Because Petitioner Did Not Testify Or Put On Evidence Contradicting The Government's Evidence, His Alleged Efforts To Influence Other Witnesses Had No Probative Value On Any Material Issue In The Case And Thus Were Inadmissible Under Rule 404(b).

In *Huddleston* this Court explained that Rule 404(b):

> generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

108 S. Ct. at 1499. The threshold inquiry under 404(b) must be whether the extrinsic act evidence is probative of a disputed issue in the case. In *Huddleston*, a prosecution for possession and sale of goods stolen in interstate commerce, the defendant took the stand and testified that he had sold the goods in question on a commission basis without knowledge that any were stolen. The government introduced evidence of two other recent transactions by defendant in stolen goods to disprove the defendant's assertions of lack of knowledge and innocent intent. Since defendant's knowledge of the origin of the stolen goods was a disputed issue in the case, the extrinsic act evidence was admissible under Rule 404(b). See also, *United States v. Smith*, 726 F.2d 183, 186 n.3 (5th Cir. 1984) ("Where the defendant makes intent an important trial issue by taking the stand and 'professing the innocence of his intent,' the defendant waives any right to contest the government's prior presentation of evidence to the contrary); *United States v. Beasley*, 809 F.2d 1273, 1278 (7th Cir. 1987) (defendant's testimony that he possessed drugs for scientific purposes justified admission of evidence of other drug acquisitions for illegal purposes).

But where the defense has not raised an issue as to intent, motive, identity or other issue identified in 404(b), extrinsic evidence may not be directed to such an issue simply because the defendant *might* have contested it. In *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988), for example, the defendant was charged with placing a small bomb on a car owned by his ex-wife's father whom he blamed for his personal problems. At trial the government introduced evidence of numerous instances of other criminal acts directed at his ex-wife, her father and her lawyer and allegedly committed by defendant. The government argued on appeal that the evidence was probative of motive and opportunity to commit the charged offense. The Court of Appeals reversed, in part, because the defendant had not contested that he had motive and opportunity to commit the charged offense. "The evidence was therefore redundant as proof of those elements and likely to be prejudicial." 860 F.2d at 634.

The question of when an issue is sufficiently "in dispute" to justify admission of extrinsic act evidence has, however, proved troublesome for the lower courts. In *United States v. Shackleford*, 738 F.2d 776 (7th Cir. 1984), an extortion case, the defendant denied that he had made any effort to extort money from the alleged victim. The government was allowed by the trial court to introduce evidence of an alleged similar incident of extortion by the defendant in order to prove the defendant's intent to commit exortion in the charged offense. Because defendant's intent could be inferred from the charged offense and because he did not raise lack of intent at trial but simply maintained that he did not commit the acts charged, the Seventh Circuit held that admission of the extrinsic act evidence was error and reversed:

> [W]e have stated that when intent is only a formal issue, so that proof of the proscribed act gives rise to an inference of intent, then unless the government

> has reason to believe that the defense will raise intent as an issue, evidence of other acts directed toward this issue should not be used in the government's case-in-chief and should not be admitted until the defendant raises the issue.

738 F.2d at 781. See also, *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975) (extrinsic evidence not admissible in case-in-chief where innocent intent not pleaded). By contrast, in *United States v. Wagoner*, 713 F.2d 1371 (8th Cir. 1986), the defendant was charged with conspiracy to bomb a police car. At trial a witness testified that the defendant paid him to plant the bomb. The government was also allowed to introduce, over objection, evidence of the defendant's involvement in an auto theft business to show motive. The Eighth Circuit affirmed.

> By pleading not guilty Wagoner necessarily disputed the issue of his membership in the conspiracy. Consequently, it was unnecessary for the government to await Wagoner's presentation of evidence before proceeding with its proof in support of the elements of the crime.

713 F.2d at 1375. In *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979), the Fifth Circuit noted that, while the admissibility of extrinsic act evidence under Rule 404(b) can seldom be decided without considering the nature of the defendant's case [2], "[w]hether a mere plea of not guilty justifies the Government in introducing extrinsic offenses

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[2] In *Beechum* the defendant was charged with possession of a coin stolen from the mail. The government was allowed to introduce evidence that, at the time of his arrest, the defendant had possession of credit cards that were also stolen from the mails to prove his unlawful intent concerning the coin. The court noted that: "Although the credit cards in this case were introduced by the Government in its case-in-chief, it was clear before the case went to trial that the crucial issue would be Beechum's intent." 582 F.2d at 915.

evidence in its case in chief is an open question in this circuit." 582 F.2d at 915.

In this case, because the government argued that the evidence of petitioner's alleged efforts to influence other witnesses was outside the coverage of Rule 404(b) altogether, the government never explained what proper purpose could be served by such evidence. But it is undisputed that, except by pleading not guilty, petitioner put at issue neither intent, identity, motive or any other fact mentioned in 404(b). The defendant did not take the stand, nor did he put on any evidence that contradicted the testimony of Arthur Ted Green or any other evidence of the government. The defense evidence consisted entirely of character witnesses. To allow intent, identity, motive or any other issue which *might* be at issue in a case to automatically become an issue, even in that class of cases where the fact is inferable from the nature of the charged offense, will create an exception that "would virtually swallow the rule against admission of evidence of prior misconduct." *United States v. Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975).

While there is no explanation in the record of this case of why the government had a legitimate need for the extrinsic act evidence, there can be no doubt that any probative value the evidence might possibly have had was far outweighed by its prejudicial effect. Charged with obstruction of justice through an attempt to influence a witness, petitioner was faced at trial with evidence of two other virtually identical instances of attempting to influence witnesses. In *United States v. Beechum*, *supra*, the Court of Appeals recognized that risk of prejudice from extrinsic act evidence is particularly great when the extrinsic offenses are similar to the crime charged:

> [T]he more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant. The likelihood that the jury will convict the defendant because he is the kind of person who

> commits this particular type of crime or because he was not punished for the extrinsic offense increases with the increasing likeness of the offense.

582 F.2d at 915 n. 20.

This case presents a paradigm of the kind of prejudice which Rule 404(b) was designed to prevent. Petitioner was charged with a single effort to corrupt a witness: the government presented evidence of two other alleged instances of petitioner's efforts to bribe witnesses involving the same subject matter. A juror, who might for any number of reasons have had reasonable doubt about whether defendant had tried to influence Arthur Ted Green with a bribe, could have easily been influenced by the other act evidence to believe that defendant was a bad person with a propensity to bribe witnesses and for that reason to decide that he bribed Arthur Green. That inference is exactly the one forbidden by Rule 404(b). See, *United States v. Beasley, supra,* 809 F.2d at 1278 ("Unless something more than a pattern and temporal proximity is required, the fundamental rule [404(b)] is gone.")

The prejudice was only magnified in this case because the government put on more evidence of the other act offenses than it did of the charged offense. Compare, *United States v. Zabaneh,* 837 F.2d 1249, 1265 (5th Cir. 1988) (conviction reversed for violation of 404(b) where "substantial portion of the total volume of testimony before jury concerned the extrinsic offenses); *United States v. Fortenberry, supra,* 860 F.2d at 632 (external offense evidence "so dominated" defendant's trial that prejudice substantially outweighed any probative value).

In *Huddleston,* this Court stated that protection against unfair prejudice should emanate primarily from "the requirement of Rule 404(b) that the evidence be offered for a proper purpose." 108 S. Ct. at 1502. The question of what a "proper purpose" for extrinsic act

evidence may by where defendant has pled not guilty but not raised a specific defense is one that has obviously produced conflicting decisions in the lower courts. Petitioner prays that the Court grant certiorari and further clarify the proper role of extrinsic act evidence under Rule 404(b).

III. Petitioner Was Denied An Impartial Trial When A Juror Intentionally Lied During Voir Dire In Order To Serve On The Jury.

During jury selection a potential juror, Robert Wayne Ward, lied concerning his qualifications. Ward stated, under oath, that he was a third year student at Southern University majoring in music. (R. Vol. V, 56, 83) In fact, although he was 21 years-old, Ward had just graduated from high school and had never attended college (R. Vol. XI, 18-19) Ward's lie concerning his qualifications was intended to make him a particularly attractive juror to the petitioner who was a graduate of Southern University, whose children attended the school and whose family and associates were long-time supporters of the institution. Ward was subsequently chosen for the jury.

Once Ward's misconduct was discovered, petitioner filed a motion to set aside the verdict and for new trial on the ground of juror bias and misconduct. (R. Vol. III, 349) During the evidentiary hearings on the motion, Ward admitted that he had intentionally lied during voir dire and that he had done so because he was anxious to serve on the jury and thought he would stand a better chance if he portrayed himself as a college student. (R. Vol. XI, 24-25) The trial judge denied the motion to set aside the verdict on the ground that there was no showing of bias on the part of Ward.

The Court of Appeals affirmed on the basis of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In *McDonough*, this Court held that, in order to obtain a

new trial because of untrue statements made by a juror during voir dire, the moving party must first demonstrate : (1) that a juror failed to answer honestly a material question; and (2) that a correct response would have provided a valid basis for a challenge for cause. 464 U.S. at 556. The Court below was "unable to conclude that juror Ward harbored actual bias against White" or "that the fairness of White's trial was impermissibly affected by juror Ward's misrepresentations." (Panel Opinion at 7)

This case, however, is different from *McDonough* in a critical respect bearing on the defendant's right to a fair trial. In *McDonough* the juror in question did not respond accurately during voir dire to a question asked to the jury panel concerning "severe" injuries suffered by the jurors or their families. It was subsequently determined that the juror's son had earlier suffered a broken leg in a work-related accident. The juror's explanation for his non-response to the voir dire question was that he did not consider the accident that his son had suffered a "severe" injury. There was no evidence whatsoever in *McDonough* that the juror had *intentionally misstated his circumstances* or that he had done so *in order to insure that he would be chosen for the jury.* By contrast, Robert Ward lied about his background precisely because he wanted to insure his selection on the jury. *McDonough* should not be controlling in this case, because, even though a truthful answer to the questions posed him concerning his education would not have furnished grounds for a challenge for cause, Ward's willingness to lie to get on the jury certainly would have furnished such a ground.

Several circuit courts have recognized that a juror's intentional untruthfulness during *voir dire* is inherently inconsistent with the parties' entitlement to an impartial jury. See, *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988) (conviction set aside when juror failed to reveal

that his brother was law enforcement officer; "strong inference" from record that juror wanted to serve on the jury and thought it unlikely that he would be permitted to do so if he told truth); *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) (intentional lies by potential juror in order to serve on jury "inconsistent" with juror's ability to weigh the evidence fairly and obey instructions of the court).

McDonough Power Equipment did not address the problem of the potential juror who lies for the sole purpose of serving on the jury. This Court should grant certiorari to consider the rights of litigants when such an intentional falsehood is proven.

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari to resolve important issues concerning the construction of Rule 404(b) of the Federal Rules of Evidence and to clarify the rights of litigants to an impartial jury.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4774

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

MARION OVERTON WHITE,
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana
(CR-87-60025-01-O)

(June 2, 1989)

Before REAVLEY, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Marion Overton White appeals his conviction for obstruction of justice. For the reasons cited herein, we affirm.

I. FACTS AND PROCEDURAL HISTORY

The instant appeal arises from a nighttime collision on a Louisiana highway between a tractor trailer and loose cattle owned by the defendant in this case. Marion Overton White (White). As a result of the accident which caused substantial damage to the tractor trailer, White was sued by the owner of the tractor trailer. Thereafter, White allegedly attempted to induce certain individuals, including Pie Green, Arthur Green and Elgy Sam, to testify that White had sold Arthur and Pie Green a few head of White's cattle and that Elgy Sam had delivered the cattle to the Greens. This was apparently an effort by White contrive a story whereby he would claim that the tractor trailer had struck the Greens' cattle so that White could escape liability for the accident. At one point, White reportedly offered Arthur Green $1,000 for his testimony.

During the discovery phase of the ensuing civil trial, White denied owing the cattle which caused the accident. Further, White testified during a deposition that he had sold Pie Green five bulls for $1,300 and that Elgy Sam had delivered the bulls to Pie and that White had actually seen the cattle on Pie's land. Aetna Life & Casualty, White's insurance carrier, ultimately paid over $70,000 in damages as a result of the accident.

Subsequently, White was the target of a federal investigation which led to White's indictment for violations of 18 U.S.C. 1621 (perjury) and 18 U.S.C. 1503 (obstruction of justice). Although the district court dismissed the perjury count because White had been sworn by an individual not qualified to administer an oath, White was convicted for obstruction of justice. From that conviction, White appeals.

II. DISCUSSION

White raises several points of error on appeal. We deal with each in turn. First, White contends that the prosecutor was guilty of misconduct by either willfully, intentionally or through gross negligence falsely representing to the grand jury that the person who administered the oath to White was qualified to do so. White strenuously argues that such a "tactic" gravely prejudiced him. We do not agree for the simple reason that the perjury count of the indictment was dismissed prior to trial. Thus, any prejudice which might have existed was cured.

Second, White contends that the prosecutor was guilty of misconduct by intentionally and impermissibly disclosing matters pertaining to the grand jury investigation. Fed. R. Crim. P. 6(e). During the course of the grand jury investigation, the prosecutor discussed the case with a private attorney, Benjamin Burns, surmising that Burns would be representing White. Burns purportedly was told by the prosecutor that an indictment against White was imminent and that a plea bargain, if any, would have to be worked out prior to the indictment. Additionally, the prosecutor arranged for Burns to interview Pie Green in order to assess Green's credibility. While we are certainly not prepared to condone such prosecutorial tactics, we nevertheless are unable to conclude that White was indeed prejudiced by the conduct of the prosecutor. Moreover, neither Burns nor Green appeared before the grand jury and there is no indication that the grand jury even knew anything about the prosecutor's contact with Burns. It is the rule in this Circuit that an indictment may be dismissed only "upon a showing of actual prejudice to the accused," and the only evidence of prejudice to White is found in conclusory statements made by White on brief. *United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979) *cert. denied*, 444 U.S. 1071 (1980).

Next, White argues that his attorney-client privilege was violated through the government's subpoena of the Aetna insurance file which contained information regarding Aetna's investigation of the truck/cattle accident. White argues that statements contained in the file which he made to Aetna representatives, whom he asserts were acting as agents of Aetna's attorneys because the Aetna policy required Aetna to defend White, are privileged. The record, however, reveals that White intended for the information which he now claims is privileged to be conveyed to others. Specifically, White told Aetna claims representative Sherrie Langly that he had sold the cattle in question prior to the accident. Thus, we are unable to view White's challenged communications as confidential, and this Court has refused to apply the privilege to information that the client intends his attorney to impart to others. *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976).

As a fourth assignment of error, White argues that the government improperly introduced the testimony of Pie Green and Elgy Sam to prove the obstruction of justice count of the indictment against White. White argues that the probative value of such testimony was outweighed by its prejudicial and confusing effect on the jury. Fed. R. Evid. 403. White also argues that the testimony was inadmissible under Fed. R. Evid. 404(b) as extrinsic offense evidence. Additionally, White argues that the evidence had the effect of impermissibly broadening the indictment by effectively adding two additional acts of obstruction of justice to Count II of the indictment.[1]

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[1] Count II of the indictment which charged White with obstruction of Justice alleged that White offered to induce Arthur Green to testify falsely. In his claim that the testimony of Pie Green and Elgy Sam impermissibly broadened the indictment, White urges that, in effect, the government sought to try him for two additional obstruction of justice counts with regard to White's contacts with Pie Green and Elgy Sam.

The decision of the district court with regard to the admissibility of evidence under Rule 403 is accorded considerable deference. In the absence of an abuse of discretion, the district court's ruling in that regard will not be overruled. *United States v. Kalish*, 690 F.2d 1144, 1155 (5th Cir. 1982), *cert. denied*, 459 U.S. 1108 (1982). On this record, we are unable to conclude that the district court abused its discretion in allowing the testimony of Pie Green and Elgy Sam. Nor are we persuaded by White's arguments that the testimony was improperly admitted under Rule 404(b). The district court, agreeing with the government, concluded the defendant's conversations with Pie Green and Elgy Sam were "part and parcel" of the offense of obstruction of justice as charged by Count II of the indictment, and as such were not improper evidence of other crimes. Likewise, we are unpersuaded by White's assertions that the testimony of Elgy Sam and Pie Green had the effect of impermissibly broadening the indictment, particularly in view of the district court's instructions to the jury that it should consider whether White committed the offense as charged in the indictment.

Next, White claims that the government improperly read into evidence at his criminal trial, excerpts from White's testimony taken during a deposition in the civil proceedings which ensued after the accident. White argues that in so doing, the government "flagrantly violated defendant's right not to testify against himself." White, however, fails to mention that he did not assert his Fifth Amendment privilege during the course of the civil deposition. Because "[a] civil deponent cannot choose to answer questions with the expectation of later asserting the Fifth Amendment," *United States v. White*, 846 F.2d at 690, we find no merit this point of error urged by White.

We turn now to White's contention that his Sixth Amendment rghts were abridged because of a defective

jury. Specifically, he urges that two jurors withheld pertinent information during voir dire. First, White claims that juror Shirline Matt held a grudge against White because she blames White for her children having to attend a private school.[2] White contends that Matt failed to communicate her prejudice against White during voir dire. Also with regard to juror Matt, White asserts that, during voir dire, Matt incorrectly asserted that that she did not know White. Second, White claims that a juror, Robert Ward, lied about his education during voir dire in order to be able to serve on the jury. White argues that both of these nondisclosures during voir dire rendered the jury which convicted him fundamentally flawed.

We reject White's contentions regarding juror Matt. The actual question posed to Matt during voir dire was whether she *personally* knew White and she correctly responded that she did not. Concerning White's contention that Matt failed to disclose her prejudice against White because of his civil rights activities, we fail to find any evidence in the record or on brief which would support such a contention. At best, we view White's allegations as conclusory and without adequate support, and therefore conclude that they are without merit. As to juror Ward, the Supreme Court has held that in order to obtain a new trial in such a situation,

> a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

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[2] White is black and is apparently involved in civil rights activities in his community. White asserts that the private school which Matt's children attend was built for the sole purpose of circumventing desegregation.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556. On these facts, were are unable to conclude that juror Ward harbored actual bias against White. Nor can we conclude that the fairness of White's trial was impermissibly affected by juror Ward's misrepresentation concerning his education.

White last urges Batson error.[3] He contended at trial, and now on appeal, that the government improperly used its peremptory challenges to excuse venire panel members because they were black. The district court disagreed with White and concluded to the contrary. Our standard of review with respect to the district court's ultimate finding on this matter is whether such findings were clearly erroneous. *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988).

The government contended at trial, and maintains now on appeal, that one of the two jurors was challenged for moral reasons in that she had children out of wedlock. The government also maintains that the second prospective juror was challenged because she was single, unemployed and of limited education. On these facts, and under the appropriate standard of review, we are constrained not to disturb the district court's finding that a Batson violation had not occurred. Moreover, the ultimate composition of the jury was 25% black—a percentage which exceeded that of the venire panel.[4] Accordingly, we reject White's contentions that the government exercised its peremptory challenges for racial reasons.

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[3] Batson v. Kentucky, 476 U.S. 79 (1986).

[4] The district court qualified an original panel of thirty-seven jurors. Of that thirty-seven, eight panel members were black. The government exercised its peremptory challenges to excuse six panel members, two of whom were black. The composition of the ultimate jury included three blacks. It is the government's peremptory excusal of the two black venire members which forms the basis of White's Batson claim.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4774

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARION OVERTON WHITE,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 2, 5 Cir., 1989, —— F.2d ——)

(Filed July 27, 1989)

Before REAVLEY, JOHNSON AND JOLLY, Circuit Judges

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate

Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ STAN JOHNSON
United States Circuit Judge

July 25, 1989

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-480

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARION OVERTON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when petitioner was charged with obstructing justice by attempting to induce a witness to provide information supporting a fabricated defense in a civil case, the trial court erred in admitting evidence that petitioner had attempted to induce two other individuals to provide similar false information.

2. Whether a juror's misstatement during *voir dire* concerning his educational background required a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-480

MARION OVERTON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unpublished, but the decision is noted at 876 F.2d 893 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1989. A petition for rehearing was denied on July 27, 1989 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was

convicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was fined $1,000. The court of appeals affirmed.

1. The evidence at trial, which is summarized in the court of appeals' opinion and the government's brief in that court, demonstrated that petitioner attempted to induce three acquaintances to provide information supporting a defense that he had fabricated to avoid liability in a civil action. Pet. App. 2a; Gov't C.A. Br. 6-9.

In 1984, a tractor trailer was severely damaged when it hit three cattle on a highway. The ear tag on one of the cattle indicated that it belonged to petitioner. The owner of the truck and other interested parties initiated a civil action against petitioner in federal court, seeking damages totalling approximately $150,000. Gov't C.A. Br. 6-7.

After the accident, petitioner told a representative of his insurance company that he had sold the cattle to Pie Green. To bolster that story, he approached Pie Green and asked Green to claim ownership of the cattle. Pie Green refused to cooperate. Petitioner also urged Elgy Sam to claim to have delivered the cattle to Pie Green. Thereafter, petitioner offered Arthur Ted Green, Pie Green's brother, $1,000 to claim that he was the owner of the cattle. Arthur Ted Green refused. During his deposition in the civil case, petitioner nevertheless denied owning the cattle and testified that he had sold them to "Ted" Green. Gov't C.A. Br. 7-9; Pet. C.A. App. 4.

In a two-count indictment, petitioner was charged with committing perjury at his deposition, in violation of 18 U.S.C. 1621, and obstructing justice by attempting to induce Arthur Ted Green to claim falsely that he was the owner of the cattle, in violation of 18 U.S.C. 1503. The district court dismissed the perjury count before trial because the

individual who had sworn petitioner at his deposition had not been qualified to administer an oath. Pet. App. 2a.

Before opening statements, the government advised the district court of its intention to introduce evidence of petitioner's efforts to induce Pie Green and Elgy Sam to provide false information suggesting that petitioner was not the owner of the cattle. The prosecutor argued that evidence of those efforts was admissible because they were intertwined with petitioner's attempt to influence Arthur Ted Green, and because the evidence also tended to show the motive underlying petitioner's approach to Green. The district court admitted the evidence. See Tr. 71-75, 93-95.

In a post-trial motion, petitioner sought a new trial on the ground that one of the jurors, Robert Ward, had misrepresented his educational background during *voir dire*. Ward had stated that he was a third-year student at Southern University in Baton Rouge, Louisiana (the college petitioner had attended), when in fact he had only recently graduated from high school and had never attended college. In a hearing on the motion, Ward explained that during *voir dire* he had been nervous and embarrassed that he had been late in finishing high school; he also stated that he had been anxious to serve on the jury and thought he stood a better chance of being chosen if he claimed to be a college student. Ward testified that he had been impartial during the trial. The district court denied petitioner's motion for a new trial. Gov't C.A. Br. 4-5, 31-32.

2. The court of appeals affirmed. Pet. App. 1a-7a. It held that the district court had not abused its discretion in admitting testimony by Pie Green and Elgy Sam regarding petitioner's attempts to influence them. The court of appeals joined in the district court's conclusion that those attempts were "part and parcel" of the offense with which petitioner was charged and thus were not evidence of other

crimes that was inadmissible under Fed. R. Evid. 404(b). Pet. App. 5a.

The court of appeals also rejected petitioner's argument that juror Ward's misrepresentation concerning his educational background required a new trial. Applying the standard established by this Court in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), the court of appeals held that there had been no showing that Ward had harbored any actual bias or that his false statement regarding his education had affected the fairness of the trial. Pet. App. 7a.

ARGUMENT

1. Petitioner renews his contention that evidence regarding his attempts to induce Pie Green and Elgy Sam to support his fabricated defense should have been excluded. In petitioner's view, the district court mistakenly failed to apply Fed. R. Evid. 404(b) to that evidence, and his decision to limit his defense to character witnesses foreclosed its admission. Pet. 5-15. The court of appeals correctly rejected those contentions, and they do not warrant further review in this Court.

By its terms, Rule 404(b) applies only to evidence of "other crimes, wrongs, or acts." Accordingly, a number of courts of appeals have held that the Rule does not govern the admissibility of evidence of acts that are closely related to the offense charged. *E.g.*, *United States* v. *Tripp*, 782 F.2d 38, 41 (6th Cir.) (card games within the time frame of a gambling conspiracy alleged in the indictment were not "other acts" for purposes of Rule 404(b)), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (evidence is not considered "extrinsic" if it "arose out of the same transaction or series of transactions as the charged offense"); *United States* v. *Aleman*, 592

F.2d 881, 885 (5th Cir. 1979) (act is not "extrinsic" if the evidence used to prove it and evidence used to prove the offense charged are "inextricably intertwined").[1] Petitioner does not challenge the correctness of this line of authority or suggest that it is the subject of a conflict among the circuits. Rather, the substance of his argument is that the lower courts erred in their determination that the approaches to Elgy Sam and Pie Green were "part and parcel" (Pet. App. 5a) of the offense alleged in the indictment. See Pet. 5-8. The court of appeals properly rejected that factbound contention, and it does not raise any issue calling for this Court's review.

In any event, the evidence clearly satisfied the standards of Rule 404(b). Evidence that petitioner had sought to induce Elgy Sam and Pie Green to support his false claim that he was not the owner of the cattle in question was not admitted for the purpose prohibited by Rule 404(b)–*i.e.*, to show that he had a propensity to commit crimes. Rather, along with evidence that petitioner told his insurance company that he was not the owner of the cattle and testified falsely at his deposition, the evidence concerning Elgy Sam and Pie Green tended to show petitioner's plan to fabricate a defense to avoid liability in the civil

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[1] In our view, the question whether acts not charged in an indictment are "intrinsic" or "extrinsic" to the offense charged is largely a matter of semantics. Under Rule 404(b), the ultimate issue is whether the evidence is offered for some purpose other than to prove the defendant's bad character–*i.e.*, his propensity to commit crimes. As in this case, evidence of other acts that are "part and parcel" of offenses alleged in an indictment will almost invariably be admissible to prove an issue other than the defendant's character. Moreover, whether or not evidence is analyzed under Rule 404(b), it must also pass muster under Fed. R. Evid. 403, which requires the trial court to balance the evidence's probative value against its prejudicial effect. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d at 41.

action. Proof of that overall scheme also tended to establish his intent to impede the administration of justice, see *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893); *United States* v. *Moon*, 718 F.2d 1210, 1236 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984), as well as the motive underlying his approach to Arthur Ted Green.

As the court of appeals concluded (Pet. App. 5a), the admission of evidence regarding petitioner's approaches to Elgy Sam and Pie Green was also not an abuse of the district court's broad discretion under Fed. R. Evid. 403. The evidence was highly probative of the offense alleged in the indictment, and there was little, if any, possibility that the jury would rely on it for an improper purpose. The fact that petitioner's defense consisted solely of character evidence did not require a different conclusion. Petitioner pleaded not guilty to the offense charged, and he did not admit any of the elements of the offense with which he was charged. In particular, he did not concede that he had acted in accordance with a plan to establish a false defense to the civil action or that his intent in approaching Arthur Ted Green was to impede the administration of justice. Because those issues were subject to dispute at trial even though petitioner chose not to offer evidence on them, the district court was not deprived of its customary discretion to conclude that the probative value of the evidence outweighed its prejudicial effect.

As the decisions cited in the petition reflect (see Pet. 10-15), a trial court called upon to determine the admissibility of "other acts" evidence may properly consider whether that evidence is cumulative or whether the issues to which it relates are uncontested. Those matters are relevant to the question whether in a particular trial the evidence has probative value that outweighs any risk that it will be put to an improper purpose. However, no rule of

evidence suggests that the admissibility of otherwise relevant and probative evidence is conditioned on a defendant's introduction of evidence. Any such requirement would be inconsistent with the Court's reasoning in *Huddleston* v. *United States*, 485 U.S. 681 (1988). Under *Huddleston*, evidence of "other acts," like any other evidence, is presumptively admissible when it satisfies the Rules' requirement of relevance.

2. Petitioner also contends that the court of appeals misapplied the standards set forth in *McDonough Power Equipment, Inc.* v. *Greenwood*, *supra*, to juror Ward's misrepresentation regarding his educational background. In *McDonough*, the Court held that to obtain a new trial in this type of situation (464 U.S. at 556)

> a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.

In this case, there is no dispute that juror Ward failed to answer honestly questions directed to his educational background. However, the district court and the court of appeals correctly determined that this misstatement did not satisfy the second part of the *McDonough* test. If Ward had testified truthfully that he was only a high school graduate and that he had not attended Southern University, there would have been no basis for a challenge for cause.

Contrary to petitioner's suggestion, the fact that Ward's motives for misstating his education included a desire to serve on the jury does not support a different conclusion. In *McDonough*, the Court emphasized that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. Here, Ward's motives–his embarrassment at having finished high school

at the age of 21 and his anxiousness to serve as a juror (Gov't C.A. Br. 32)–did not suggest that he was prone to favoring either party during the trial.[2] Moreover, the post-trial hearing on petitioner's motion disclosed no evidence whatever that Ward was actually biased or that he had failed to discharge his obligations as an impartial juror. There was no showing that Ward's misrepresentation had any effect on the fairness of the trial. Under *McDonough*, petitioner's motion for a new trial was properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

NOVEMBER 1989

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[2] In the cases cited in the petition (Pet. 16-17), by contrast, jurors had concealed information that suggested a bias toward a party in the case. In *United States* v. *Scott*, 854 F.2d 697, 698 (5th Cir. 1988), the juror failed to disclose, in response to a question regarding potential jurors' relationships with law enforcement officers, that his brother was a deputy sheriff; moreover, the trial court found that if that information had been disclosed, the juror would have been excused for cause. Similarly, in *United States* v. *Colombo*, 869 F.2d 149 (2d Cir. 1989), the juror intentionally withheld the information that her brother-in-law was a government lawyer.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00626